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NOTES

Laws That Are Made To Be Broken: Adjusting for Anticipated Noncompliance

Any mandatory legal rule[1] is bound to encounter some noncompliance,[2] which may arise not only from deliberate disobedience but also from such sources as lapse of rationality, weakness of will, inattentiveness, ignorance, and mistake. Noncompliance due to sources other than deliberate disobedience is generally not responsive to increases in enforcement and severity of penalties, and it thus seems clear that at least some noncompliance is inevitable. Moreover, while deliberate disobedience may, in theory, respond to increased law enforcement, the costs of eliminating it altogether, or even reducing it sharply, may often be prohibitive. If noncompliance cannot be entirely eliminated, and attempts to reduce it sharply are unacceptably expensive, then it is reasonable to formulate legislative strategies that minimize or prevent the societal harm that noncompliance may produce.

This Note explores and defends a legislative strategy that has neither been clearly articulated by legal theorists[3] nor methodically

1. Mandatory legal rules are legal rules that impose an obligation to perform or refrain from performing certain actions. Not all laws are mandatory legal rules. The class of laws identified by H.L.A. Hart as "power-conferring rules" contains many examples of laws that cannot be subjects of compliance. *See* H.L.A. HART, THE CONCEPT OF LAW 27-38 (1961). An obvious example is a law creating a court and establishing its jurisdiction. *See, e.g.*, Bankruptcy Act § 2, 11 U.S.C. § 11 (1970) (creating bankruptcy courts and establishing their jurisdiction). Other examples of nonmandatory legal rules are those providing definitions, *e.g.*, FED. R. CIV. P. 3, and certain court-made legal rules, *e.g.*, the rule of property law that a contingent remainder is destroyed if the preceding estate is terminated before the remainder vests. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS 216-18 (2d ed. 1956).

2. The term "noncompliance" is used throughout this Note to indicate any behavior that fails to conform to a legal requirement, whether or not the agent intends that the behavior not conform, whether or not the agent is aware that the behavior fails to conform, and whether or not the circumstances in which the behavior occurs would provide grounds for excuse or mitigation. This use of the term is not universally accepted. *See* Feest, *Compliance with Legal Regulations: Observation of Stop Sign Behavior*, 2 LAW & SOCY. REV. 447 (1968). This Note is not concerned with laws that make knowledge of the illegality of an action a necessary element of the offense. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, 196, 201-02, 714-15 (1972); Wasserstrom, *The Obligation To Obey the Law*, 10 U.C.L.A. L. REV. 780, 782 n.4 (1963).

3. While Henry Sidgwick never recognized the strategy described in this Note, he came close to recognizing the conditions under which that strategy may be profitably pursued: "[T]here may be rules of social behavior of which the general observance is necessary to the well-being of the community, while yet a certain amount of non-observance is rather advantageous than otherwise." H. SIDGWICK, THE METHODS OF ETHICS 486 (7th ed. 1963).

pursued by practical lawmakers.[4] Most laws are introduced with the expectation that they will sometimes be broken, but it is generally thought that noncompliance diminishes the utility of laws.[5] It is possible, however, to design laws the utility of which is actually enhanced by a certain amount of noncompliance. As a corollary, it can be shown that it is rational, under some circumstances, for a legislature to enact laws[6] that are not just expected but are *intended* to be broken with a certain frequency, by a certain portion of the population or to a certain degree. It is in this sense that the laws discussed in this Note are aptly characterized as "made to be broken."

Generally stated, the strategy set forth in this Note is to investigate the propensities of the population to fail to comply with laws regulating certain behavior, and then to design, accordingly, laws that make allowance for the amount of noncompliance expected. Typically, making such an allowance for noncompliance involves promulgating a rule that is stricter than that which one would otherwise promulgate if noncompliance were unexpected. The intended result of such an adjustment is that less societal harm would be produced by violations of the stricter rule than would be produced by inevitable violations under a more lenient rule chosen with (incorrect) expectations of universal compliance. Thus, laws should be constructed not as if they are to function in a society in which universal compliance will occur[7] but should be formulated to achieve the best results under the level of compliance that is expected to prevail.

Section I analyzes the conditions under which it would be rational to introduce a law that is made to be broken, and more explicitly delineates what it means to say that a law is made to be broken. Section II presents two hypothetical laws that are, it is argued, rationally made to be broken. In Section III, objections to designing laws to accommodate noncompliance are considered. Section IV then examines an existing law—obligating jurors to follow the court's instructions on the law—that is arguably made to be broken, and compares this law with the hypothetical laws offered in section II. Finally, section V generalizes about the situations in which it

4. While there is no evidence that lawmakers have consciously pursued the strategy, they have sometimes produced laws that function very much like laws that would be products of the strategy. *See* note 54 *infra* for an example of such a court-made law.

5. *See* J. ANDENAES, PUNISHMENT AND DETERRENCE 12-13 (1974) ("[L]egislators probably realize that many will break the rules but reason that many will observe them, so that something, at least, will be gained.").

6. The discussion in this Note refers primarily to statutes, but it could be extended to administrative regulations and court-made legal rules. *See* note 54 *infra.*

7. *But cf.* R. BRANDT, ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS 490 (1959) ("[O]ur actions, whether legislative or otherwise, should be guided by a set of prescriptions, the conscientious following of which by all would have maximum net expectable utility.").

might be fruitful to pursue the strategy of making allowance for expectable noncompliance.

I. Designing Laws for Expectable Noncompliance

The following analysis states conditions necessary and sufficient for rational introduction of a law that is intended to be broken:

> It is rational[8] for a law-making body to introduce a law with the intention that it be broken, if and only if the law-making body believes and has reason to believe that:
>
> (1) the law will encounter some amount of noncompliance if introduced;[9]
>
> (2) the law would be more effective in achieving or maintaining a socially desirable state of affairs if noncompliance approached the predicted level, than if the law were universally complied with; and
>
> (3) given the existing tendencies for noncompliance in the population, the law is at least as good as any available alternative for achieving the desired outcome.[10]

It is against this framework that putative examples of laws that are rationally made to be broken shall be evaluated.

Condition (1) is designed to ensure that the legislature has some reasonable estimate of the degree of noncompliance the law will encounter. Although an expectation of some noncompliance is reasonable with respect to any law, expectations that lack a reasonable degree of specificity will not usually provide a sound foundation for formulation of a law designed to be broken. This is not to say that predictions must be precisely quantifiable,[11] but estimates must at

8. The term "rational" appears as part of the *analysandum* (the statement being analyzed) and is hence formally defined by the necessary and sufficient conditions of the *analysans* (the statements providing the analysis).

The following informal definition might also be helpful. The predicate "is rational," when applied to legislative decisions, may be read in two ways, either of which is acceptable for purposes of this Note. It may be read in the straightforward sense of "is not the product of an intellectual mistake" or "is not based on inadequate data or faulty inference." A more illuminating definition might be "is the product of a benefit-cost analysis whose projections are based on adequate evidence and reasonably accurate balancing of all relevant factors." Since considerations of injustice and immorality are costs in a complete benefit-cost analysis, a legislative choice will not be deemed rational unless it takes considerations of this kind into account. Naturally, not all rational choices are veridical ones. *See generally* J. Rawls, A Theory of Justice 407-24 (1971) (discussing the notion of "deliberative rationality").

9. While condition (1) suggests a quantitative measure of noncompliance, and while the common situation in which it is profitable to design a law to be broken will involve a quantitative prediction of noncompliance, there are situations in which a nonquantitative measure can be used. *See* text at notes 75-76 *infra.*

10. Thus, for each societal goal, there may be a maximal class of laws, each member of which is superior to all laws not included in it, but no member of which is superior or inferior to any other member. *Cf.* J. Rawls, *supra* note 8, at 409.

11. It is assumed that any scientific approach to legislative selection will involve the accumulation of evidence to predict the degree of noncompliance a law would

least be specific enough to enable one to assert with some confidence that significant deviations from the predicted levels are not likely to occur. Without a reasonably specific estimate of noncompliance, the impact of a law made to be broken could not be ascertained, and, hence, it would be irrational to rely on such a law.

A reasonable expectation of some specific amount of noncompliance is not sufficient to create an *intention* that the law one enacts be broken. To introduce a law with the intention that it be broken, it is also necessary that one both expects noncompliance and actually considers such noncompliance preferable to universal compliance.

Condition (2) is designed to ensure that the relevant intention is present and that this intention is rational. If condition (1) is satisfied (*i.e.*, the degree of noncompliance that a proposed law would encounter is known), the legislature can evaluate how effectively the law would bring about or maintain the desired social state. Furthermore, it can ask whether the law would be more or less effective in achieving the desired social state if, contrary to legislative expectations, the law were universally complied with. Unless the legislature reasonably concludes that the law would be more effective if compliance with it were universal, it would be irrational to prefer that the law be universally complied with rather than broken to the expected degree.

It can be demonstrated, at least in theory, that there are conditions under which it would be rational for a legislature to prefer less than universal compliance with a law. Suppose there is an action of type A, which is such that (i) if the number of performances of actions of type A approximates n, then society derives a net benefit, and (ii) the benefits to society from performances of action of type A decrease as the number of performances of actions of that type di-

encounter if it were enacted. The adequacy with which the law accomplishes its designated end will depend in part on the level of noncompliance it encounters.

Predictions of noncompliance will typically be based on evidence about the behavioral dispositions of the population—its tendency to behave as the proposed law would require or forbid. *Cf.* Note, *A Framework for the Allocation of Prevention Resources with a Specific Application to Insider Trading*, 74 MICH. L. REV. 975, 977-78 n.5 (1976). An important factor that influences the behavioral dispositions of a population is the quantity and quality of enforcement resources utilized to encourage compliance with the law. When a prediction is made as to the level of compliance a law would enjoy if enacted, an estimate of the resources available for administering and enforcing the law is relevant. *See* Stigler, *The Optimum Enforcement of Laws*, 80 J. POL. & ECON. 526, 527 (1970). The estimate is determined by the general quantity of resources available for law enforcement and the supposed importance of the goal toward which the law in question is directed. Once it is determined what resources are available for accomplishing some societal goal through legal regulation, rival alternatives can be laid out and predictions can be made about the expected level of compliance each would enjoy if introduced. Factors such as the behavioral tendencies of the population and the quantity and quality of resources available for enforcement are held constant for the comparison. The reasonableness of an expectation of noncompliance will depend on whether the expectation is grounded on predictions supported by adequate empirical evidence.

verges from n. Suppose further that, absent a law proscribing actions of type A, the number of performances would be considerably greater than n. Now, if a law proscribing actions of type A can be designed such that the deterrent effects of the proscription would cause the number of performances of such actions to fall to n, but not lower, the law would ensure that society derived maximal benefits from actions of type A. If the law were universally complied with, however, fewer than n performances would occur—a less than optimal result. Under such circumstances, it would be rational to prefer that the law encounter some quantity of noncompliance rather than that it be universally complied with.[12]

Condition (2) embodies only a judgment about the comparative effectiveness of one law under varied conditions of compliance. Yet even if noncompliance with a law were predictable and the law were successfully designed to be most effective under the planned-for level of noncompliance, it does not follow that the law would be more effective than other possible laws. Thus, a necessary third condition is that the proposed law be the best available alternative for achieving the desired state of affairs. However, condition (3) is far easier to understand than it is to apply, for the decision as to what constitutes "the best alternative" requires consideration of numerous, often unquantifiable, and frequently conflicting factors.

An obvious criterion for the selection of a law is the extent to which that law will bring about a desired outcome, such as highway safety, safe drugs, or clean air. Also relevant, however, are the costs of implementation, for laws that might fully realize societal goals may sometimes be rejected in favor of alternatives that would effect the goal less completely but also less expensively.[13] Moreover, it must be recognized that a law might be remarkably effective in bringing about a particular goal but nevertheless be unacceptable because it violates important principles of justice or morality. A law,

12. It should be noted that the preference for noncompliance required for satisfaction of condition (2) differs significantly from a more generally recognized preference that lawmakers often must display under a traditional benefit-cost analysis. *See* Stigler, *supra* note 11, at 527; Note, *supra* note 11, at 978. It is frequently the case that the costs of Herculean enforcement efforts and draconian penalties necessary to achieve universal compliance outweigh whatever additional benefits that would accrue to society if universal compliance obtained. The "preference" for noncompliance in this sense may be more accurately translated as "settle for." The implication under such analysis is that gratuitous increases in compliance should be welcomed. In contrast, when a law is made to be broken in accordance with the strategy set forth in this Note, an increase in compliance would be unwelcome even if it came gratuitously, for an increase in compliance above n would diminish the effectiveness of the law.

13. One reason why per se rules are sometimes preferred, illustratively in the antitrust field, is that alternatives requiring case-by-case determinations are administratively too expensive. *See* E. GELLHORN, ANTITRUST LAW AND ECONOMICS 187 (1976); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 434-40 (1970).

for example, that sought to control population growth by calling for the extermination of a certain percentage of the population per year would be plainly unacceptable despite its obvious effectiveness.

At the same time, it is important to emphasize that a violation of principles of justice or morality—even important principles—may not in itself be sufficient to render a law unacceptable, though certain principles may be so heavily weighted that any law that violated them would be almost conclusively unacceptable. After all, the consequences of failing to bring about or prevent certain states of affairs might be so catastrophic that even important principles would have to be overridden.[14] Hence, any injustice or moral objectionability associated with a law should be considered as merely one of several factors to be included as a cost in a benefit-cost analysis of the law. Whether a law is, in fact, the best alternative will depend on a determination of the importance of the goal it is designed to achieve, the effectiveness with which it brings about that goal, the degree of injustice it creates, the extent to which it offends morality, and the comparative effectiveness, justness, and moral offensiveness of other available alternatives for achieving the same goal.[15] Even if a law that is made to be broken creates injustice or offends morality, this does not mean that it is not the best of available alternatives.

In summary, condition (1) requires that an estimate be available of the degree of noncompliance that will attach to a law if it is introduced. Condition (2) specifies when it would be rational to prefer that a law be broken to the estimated degree rather than universally complied with. Condition (3) establishes the circumstances under which the introduction of such a law would be rational—namely, when a benefit-cost analysis would select it over available alternatives. In making this selection, consideration is to be given not just to those features of the proposed laws that bear on their effectiveness, but also those features that are relevant to their justness and moral offensiveness. A law is rationally made to be broken if and only if it meets all three conditions.

II. Hypothetical Laws That Are Made To Be Broken

The previous section established a conceptual framework for the identification and assessment of laws that are made to be broken.

14. The Supreme Court seems to have engaged in such balancing in upholding the exclusion of Japanese-Americans from certain areas in a wartime situation. *See* Korematsu v. United States, 323 U.S. 214 (1944).

15. The absence of a precise formula for balancing these factors does not preclude sensible balancing in particular cases. Principles of benefit-cost analysis, with all their vagaries, remain applicable to the determination. *See generally* E. Mishan, Economics for Social Decisions: Elements of Cost-Benefit Analysis (1973); P. Musgrave & R. Musgrave, Public Finance in Theory & Practice 134-84 (1973); Priest & Turven, *Cost-Benefit Analysis: A Survey*, Econ. J. 683-735 (1965).

To illustrate the acceptability of this strategy, this section sets forth two examples of laws that are, it is argued, rationally made to be broken. The first example—a highway speed limit—is a law that is optimally effective if the population as a group departs from the law to a certain degree. The effectiveness of the second hypothetical law—one against hunting—is dependent, not upon the degree to which people depart from the law, but upon the total number of acts in violation of the law.

Suppose that the optimal maximum speed of vehicles on a particular highway has been calculated to be fifty-five miles per hour. Assume also that past experience indicates that, given the maximum penalties deemed appropriate for speeding violations,[16] and given the limited resources available for policing the highways, drivers tend to exceed posted speed limits by ten per cent.[17] To obtain the optimal traffic flow, therefore, the speed limit could be posted at fifty miles per hour and enforced as vigilantly as any other speed limit, under a speeding statute that might take the following form:

> It shall be unlawful to drive on highway X at speeds in excess of fifty miles per hour. Those who do so are subject to penalty P.[18]

The result of introducing this law is that the common travel speed of drivers would be fifty-five miles per hour, and traffic flow would be maintained at the optimal level. Quite clearly, this speeding law has been made to be broken. The law reaches peak effectiveness when many drivers depart from it to a certain degree; if there were universal compliance (*i.e.*, if no driver exceeded fifty miles per hour), the effectiveness of the law would diminish.

Given the facts assumed in this example, conditions (1) and (2)

16. Most legal theorists accept some upper limit on the severity of sanctions that may be imposed for various offenses—whether on purely retributivist, purely utilitarian, or hybrid grounds. *See, e.g.*, I. KANT, THE PHILOSOPHY OF LAW 194 (1887) (retributivist position that punishment must vary with nature and gravity of crime); J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179-80 (1970) (utilitarian position that a principle of "frugality" must be used in imposing penalties since punishment is a cost, not only to punished offenders, but to society as a whole); Stigler, *supra* note 11, at 528-29 (utilitarian position that considerations of marginal deterrence limit the severity of penalties for all but the most objectionable offenses); F. ZIMRING & G. HAWKINS, DETERRENCE 35 (1973) (hybrid theory employing "the retributive notion of appropriateness as fixing an upper limit to the range within which penalties may be selected on utilitarian grounds").

17. This hypothetical example serves heuristic purposes only; it is not intended to reflect the complex factors actually taken into account in determining optimal speed limits. A more realistic case would consider optimal speed distributions rather than a uniform speed, for disparities in speed among large groups of vehicles are inevitable. A central objective of traffic flow engineers is to produce a narrow speed distribution curve, for danger of collision is minimized when disparities in speed are minimized. For a comprehensive discussion of many of the factors influencing traffic flow and of a description of a widely used technique for setting speed limits, see K. JOSCELYN & R. JONES, MAXIMUM SPEED LIMITS: FINAL REPORT (1970).

18. P is the maximum penalty deemed conscionable for speeding violations.

are satisfied.[19] It can also be shown that the hypothetical speeding law is superior to obvious alternatives and thus satisfies condition (3). Posting the speed limit at fifty-five miles per hour and greatly increasing enforcement of the law would be the most obvious alternative. However, since enforcement resources are, by hypothesis, limited,[20] the costs of achieving substantial compliance may be prohibitive. Increasing penalties for speeding is not possible since it has been assumed that penalties already approach the greatest degree of severity deemed appropriate for violations of this kind.[21] Failing to impose penalties under the fifty-miles-per-hour statute until drivers exceed fifty-five miles per hour would be unworkable since one factor that leads drivers to exceed posted speed limits by only ten per cent is their perception of the likelihood that they will be penalized. Finally, such technological strategies as requiring installation of governors on engines that would prevent vehicles from reaching speeds greater than fifty-five miles per hour might be undesirable because on other highways the optimally maximum speed could be greater than fifty-five miles per hour. From the point of view of effectiveness, then, this speeding law appears to be a rational choice.[22] Objections based on moral or ethical grounds are considered in section III.

Adoption of a law that is made to be broken may be rational, not only when it is predicted that people will depart from the law to a certain degree, but also when it is predicted that a certain number of acts of noncompliance will occur—that is, when some portion of the population will comply and some portion will not. For example, consider a herd of animals that produces a beneficial environmental impact so long as its size remains within certain bounds. Let n and m be the lower and upper bound, respectively, between which benefits are produced. Suppose that if unrestricted hunting were permitted the herd size would fall below n, but that if no hunting took place the number of animals would exceed m. Consider the impact of introducing a proscription on hunting such as the following:

19. *See* text at note 9 *supra.*

20. *See* text at note 17 *supra.*

21. *See* text at note 18 *supra.*

22. It might be contended that use of license suspension or revocation would obviate the need for resorting to a law such as the one proposed. However, even if conditions were such that suspension or revocation needed to be incorporated into the penalty, these measures should be seen as complementing rather than replacing the law. Secondly, it is not clear that license suspension and revocation are effective deterrents to speeding. *See* R. COPPIN & G. VAN OLDENBECK, DRIVING UNDER SUSPENSION AND REVOCATION: REPORT TO THE CALIFORNIA DEPARTMENT OF MOTOR VEHICLES (1965); Campbell & Ross, *The Connecticut Crackdown on Speeding*, 3 LAW & SOCY. REV. 55 (1968); Hricko, *Driver License Suspension: A Paper Tiger*, THE POLICE CHIEF, Feb. 1970, at 20-24.

It shall be unlawful to hunt animals of species Y. Poachers are subject to penalty P.[23]

If everyone could be expected to comply with this law, then it would be irrational to introduce it, for the herd size would grow beyond m. Assume, however, that some persons are expected to disregard the poaching law, and that the projected class of poachers can be predicted to kill just that number of animals sufficient to maintain herd size between n and m. Under such circumstances the poaching law would be an effective means for maintaining the optimal herd size. The poaching law would behave as a law that is made to be broken, for it would attain peak effectiveness when a certain number of acts of noncompliance occurred. The details of this example could be expanded to show that the poaching law is more effective than natural alternatives.[24]

III. Consideration of Ethical Objections

It has been shown above that our hypothetical laws are more effective than available alternatives for accomplishing the social objectives toward which they are directed. However, it remains to be considered whether these laws should nevertheless be rejected on ethical grounds. One possible contention is that at least some acts of noncompliance are beneficial to society, and that punishment of such acts is therefore unjust. A second possible objection is that it is unfair to those who conscientiously obey the law to have to forgo certain activities because the law has been adjusted for a degree of noncompliance. Finally, it might be argued that it is inherently

23. P is the maximum penalty deemed conscionable for poaching violations.

24. One alternative would be to permit hunting only seasonally. However, pouring enforcement resources into the prohibited season might be unworkable because enforcement resources are too limited for effective seasonal enforcement. Permitting hunting but imposing limits on the number of animals each hunter may kill might fail for similar reasons. The very tendencies toward noncompliance that lead persons to poach might also lead them to take more than the specified share. More interesting is the alternative of initiating a licensing system and using fees to increase enforcement resources. Income from fees might increase enforcement somewhat, but it is unlikely that poaching would be eliminated completely. Suppose that the number of licenses issued were exactly that number necessary to maintain the herd at the desired level, *provided that* only those persons with licenses hunted. It would still be necessary to contend with those who continued to hunt without a license. It cannot be assumed that all and only those persons who would become poachers would purchase licenses if given the opportunity. Unlicensed hunters might then contribute to the killing of too many animals. Suppose instead that *fewer* licenses were issued in order to make allowance for unlicensed hunting. Then the combined killings by licensed and unlicensed hunters would yield the optimal herd size. But this is not a genuine alternative to the poaching law for it is tantamount to introducing yet another law that is made to be broken—the law that only those who purchase licenses may hunt. That law would not be effective unless it were sometimes broken, for in order to obtain a sufficient number of killings, some unlicensed hunting would be necessary. Lottery systems or taxation systems are subject to similar criticisms.

unacceptable to pass a law the intent of which is at variance with its explicit language.

A. *Punishing Beneficial Actions*

The first question to be considered is whether it is unfair to punish persons for actions that produce a net benefit to society. In the case of the speeding law, persons who drive at fifty-five miles per hour are contributing to the desired traffic flow but at the same time are exposed to the risk of penalties for exceeding the posted speed of fifty miles per hour. Similarly, those who violate the poaching law may contribute to the optimal herd size but are still exposed to the risk of punishment.

Despite an intuitive appeal, objections based on this rationale will not withstand close scrutiny. First, one must distinguish between actions that are benevolently undertaken and actions that have beneficial consequences. An action is *beneficial* if it produces net benefits for society; an action is *benevolent* if it is performed with the intention that it benefit society, whether or not it actually does so.[25] Not every action that is in fact beneficial to society is intended to be so; one might act out of selfishness, negligence, or even malevolence, but the act might turn out to have beneficial consequences.

There is nothing morally improper about punishing persons for actions that have merely beneficial consequences.[26] For example, suppose that *A* detains *B* while robbing him, and thereby saves *B* from a fatal accident. Punishment of *A* would be proper although a net benefit is produced by one of the very acts—forcible detention—that makes *A* liable to punishment.[27] Moreover, punishment is arguably proper even where no trace of "moral culpability" is present.[28] Strict criminal liability might be imposed on a grocer who

25. G.E. Moore drew a similar distinction between acts that are "right" and acts that are done for good motives, arguing that the rightness or wrongness of an act is determined by its actual consequences. Moore's use of this distinction is not incompatible with the use made of the distinction in this Note, for Moore separated questions about the rightness or wrongness of an act from questions about whether or not the agent should be praised or blamed for the act. *See* G. MOORE, ETHICS 170-91 (1912).

26. *Cf.* Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293 (1975). *But see* Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 267 (1975).

27. Fletcher poses this hypothetical:

> Suppose that R impermissibly takes S's car for a ride. Unbeknownst both to R and S, the car is loaded with explosives timed to detonate in two hours. R leaves the car on a country road, where it explodes, injuring no one. If he had not taken the car it would have exploded in a crowded neighborhood, probably killing several people. Is R guilty of joyriding?

Fletcher, *supra* note 26, at 299.

28. *See* United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969) ("[I]t is commonly conceded that the exercise of moral judgment based upon individual

unwittingly sells tainted mushrooms that kill a potential mass murderer.[29] Thus, whether or not punishment of benevolent actions is always or ever improper,[30] the fact that an action has beneficial consequences is not by itself a sufficient ground for refusing to punish it.

Even if punishment of beneficial actions is not morally objectionable, it might nevertheless be maintained that, on purely utilitarian grounds, such punishment is irrational. This position rests on a confusion between the justification for punishment of a *particular* act and the justification for a general practice of punishing actions of a certain *kind*.[31] In framing a rule prohibiting actions of a certain kind, a legislature should not calculate the utility that each isolated performance of an action of that kind would have.[32] Rather, when regulation of behavior of a certain kind is contemplated, the relevant consideration is a comparison between the collective consequences of actions of that kind that would occur if no regulation were intro-

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standards does not carry with it legal justification or immunity from punishment for breach of the law") (footnotes omitted); Feinberg, *On Justifying Legal Punishment*, in C. FREIDRICH, NOMOS III: RESPONSIBILITY 156-57 (1960).

29. *See generally* R. BRANDT, *supra* note 7, at 487; Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

30. Punishment of benevolent actions is not necessarily improper. If a person assassinates the President out of a sincere belief that this is best for the nation, his good motives do not make his punishment improper. The Supreme Court has explicitly stated that the presence of both good motives and beneficial effects is not a sufficient condition to excuse liability:

> The [law cannot] be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policies with the good intentions of the parties, and, it may be, of some good results.

Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1926). Even if there is some reluctance to punish benevolent actions, one should not have qualms about punishing those who violate the proposed speeding or poaching law. It is unrealistic to suppose that speeding and poaching will usually result from benevolent rather than selfish motives. *See* Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 432 (1969). Thus, the actions of those who violate these laws are merely beneficial, and the fact that an action is beneficial is insufficient for withholding punishment.

31. *See* Rawls, *Two Concepts of Rules*, 64 THE PHILOSOPHICAL REV. 3-32 (1955). While Rawls has been especially influential in popularizing the distinction, many philosophers have independently identified it. *See, e.g.*, S. TOULMIN, THE PLACE OF REASON IN ETHICS (1950); Quinton, *On Punishment*, 14 ANALYSIS 133-42 (1954); Mabbot, *Punishment*, 48 MIND 152 (1939); Feinberg, *supra* note 28, at 161 n.5. Criticisms of some interpretations of Rawls' distinction between justifying practices and justifying particular actions falling under them may be found in D. HODGSON, CONSEQUENCES OF UTILITARIANISM 24-26, 31-32 (1960). More general criticisms appear in D. LYONS, FORMS AND LIMITS OF UTILITARIANISM 187-97 (1965); T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 51-75 (1969).

32. *See* J. AUSTIN, 1 LECTURES ON JURISPRUDENCE 114 (5th ed. 1885) ("If we would try the tendency of a specific or individual act, we must not contemplate the act as if it were single and insulated, but must look to the class of acts to which it belongs").

duced and the collective consequences of like actions that would occur under the contemplated regulation.[33]

In the case of prohibited actions that have "threshold effects"—that is, actions that are not harmful unless they occur with substantial frequency[34]—a general practice of punishing those who breach the prohibition may keep the incidence of actions below the threshold and prevent isolated occurrences from having harmful consequences. This would be a result of the deterrent effect generated by the general knowledge of the practice of punishing violations. However, failure to maintain the general practice of punishing violations could result in an undesirable number of such actions. Deterrence generated by the practice would be undermined if, in each instance, the utility of imposing or failing to impose the punishment specified by law were calculated. Such a case-by-case calculation would be an entirely different practice from the one suggested here and would likely have a substantially different impact on the behavior of the population.[35] Thus, any apparent increase in social utility gained in case-by-case evaluations might be outweighed by an increase in systemic disutility such individual evaluations produce.

Consider the consequences of failing to maintain the practice of punishing violations of the poaching law. If the practice were abandoned, the incidence of poaching might then exceed desired levels. The crucial point is that each killing by a poacher when a poaching law is in effect is beneficial only because a limited total number of killings take place. Absent a general practice of punishment, each killing by a poacher would, when combined with the killings of other poachers, contribute to a reduction of the optimal herd size. It is the existence of a practice of punishment that prevents instances of poaching, detected or undetected, from having harmful consequences.

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33. Austin offers a similar but somewhat more simplistic suggestion:

> We must suppose that acts of the class were generally done or omitted, and consider the probable effect upon the general happiness or good.
>
> We must guess the consequences which would follow, if acts of the class were general; and also the consequences which would follow, if they were generally omitted. We must then compare the consequences on the positive and negative sides, and determine on which of the two the *balance* of the advantage lies.

J. AUSTIN, *supra* note 32, at 114 (emphasis original).

Austin assumes that the relevant comparison is between universal performance and universal omission of a kind of act. However, it is possible that either alternative entails net harm, but that some intermediate number of performances produces net benefits.

34. *See* D. HODGSON, *supra* note 31, at 167; D. LYONS, *supra* note 31, at 206-13.

35. Thus, if it became common knowledge that, in each case, courts would calculate whether the defendant's action had net beneficial consequences before deciding to impose punishment, the expectations of the population about the probability of sanctions being imposed for discovered violations would be altered considerably. This might result in more people taking the risks and performing proscribed actions. *See generally* D. HODGSON, *supra* note 31, at 91-97.

Thus, the poaching law does not involve punishing independently beneficial actions but, as it were, transforms potentially harmful actions into beneficial ones through maintenance of a practice of punishing actions of that kind.

A further source of uneasiness about enforcing our hypothetical poaching and speeding laws stems from the fact that the legislature *wants* people to break these laws and then punishes them for so doing. However, once one understands the nature of this legislative desire and at what point in time it arises, it no longer appears to be objectionable. Justification again begins with the observation that, if everyone could be relied on to comply with all laws, the strategy of adjusting laws for expectable noncompliance would never be pursued. But once the legislature determines, as it must, that certain activities will persist despite laws prohibiting them, then laws quite properly and rationally are designed and selected according to how well they function in the presence of such behavior. It is not simply that the legislature wants people to break laws; rather, given that it can expect noncompliance to obtain, the legislature employs the law that best minimizes the harm from such noncompliance. It is only after a commitment is made to a law that is made to be broken that the legislature wants the predictions on what that law is based to hold true.[36]

Finally, there is nothing insidious about setting penalties and deploying enforcement resources in such a way that less compliance is obtained than otherwise might be had with more severe penalties and more vigilant enforcement: This practice pervades all lawmaking. Society is unwilling to pay the price of enduring draconian penalties and total police mobilization to ensure complete compliance with any law.[37] The penalty for jaywalking is not life imprisonment, even though more people would refrain from jaywaking if it were.[38] Thus, it is no objection to a law that is made to be broken that greater enforcement would further limit the class of lawbreakers.

B. *The Problem of Unfairness*

The second class of objections raised against the speeding and poaching laws is that they are unfair to persons who conscientiously

36. The speeding law illustrates this point. Since it has been assumed in this Note that people will exceed posted speed limits by 10 per cent regardless of the posted speed, the speed limit chosen was that at which unavoidable noncompliance would produce the most beneficial results. While it is not desired that people exceed speed limits, when a law that is expected to be broken is selected, the legislature does not desire that people suddenly begin to comply with the new law. Total compliance would move traffic below the optimal rate.

37. *See* note 16 *supra*.

38. *See generally* Feinberg, *Noncomparative Justice*, 83 THE PHILOSOPHICAL REV. 297, 311 (1974).

comply with them. These persons, it is claimed, forgo the satisfaction of engaging in the activities that the hypothetical laws proscribe, and thus lose whatever benefits their participation in such activities would bring. Use of either the speeding law or the poaching law does indeed impose costs on conscientious persons that would not have been imposed if adjustment were not made for the behavior of nonconscientious persons. Those who drive at fifty miles per hour solely out of obedience to the speeding law would undoubtedly be willing to drive at the optimal fifty-five miles per hour if the speed limit were so set. Similarly, those who refrain from hunting out of obedience to the poaching law lose all the satisfaction hunting might bring them, although such persons would be willing to cooperate in a lottery or some other arrangement that would give them a limited but fair chance to hunt lawfully; they are asked to give something up so that an adjustment can be made for those who are not conscientious.

While it must be conceded that some degree of unfairness exists in utilization of laws that are made to be broken, this unfairness does not warrant abstinence from use of such laws. Some degree of unfairness associated with a particular law must be tolerated if elimination or mitigation of unfairness would seriously diminish general welfare or create equal or greater unfairness with respect to the impact of other laws. Thus, the costs of enforcing a law vigorously enough to extinguish all noncompliance (most likely an impossible goal in any case) will often be unacceptably high, and concentration of enforcement resources to eliminate or sharply reduce unfairness associated with one law inevitably forecloses opportunities for reducing unfairness associated with other laws. Unfairness results whenever some persons do and some persons do not comply with a law that proscribes an activity that everyone has an interest in enjoying. It is unfair, for example, to those who refrain from parking in restricted zones, or cheating on tax returns, or stealing, that others engage in such conduct. That society retains laws prohibiting such conduct despite its inability or unwillingness to eliminate such conduct altogether shows that society must, or is willing to, tolerate some degree of unfairness. Use of laws that are not completely enforceable reflects a judgment that fairer alternatives—alternatives that will ensure perfectly equal enjoyment (or deprivation) of a desired benefit—are either unavailable or unworkable.

It will now be shown that, although it is unfair to those who comply with the speeding law or the poaching law that others do violate these laws and indeed are expected to violate them, fairer alternatives are either unavailable or unworkable. It makes no difference in this analysis of fairness that these hypothetical laws are premised on a legislative desire for such violations. The speeding law and the poaching law warrant separate treatment. The poaching law will be considered first.

The fairest alternative to our hypothetical prohibition of hunting would be an arrangement under which a random selection procedure were employed to determine which persons are legally permitted to hunt. Suppose it were first determined how many persons could be permitted to hunt without adversely affecting herd size, and that the requisite number of persons were then selected on a random basis. Such an arrangement would give everyone a fair but limited chance to hunt lawfully, and might be thought preferable to a complete prohibition on hunting. This arrangement, however, appears attractive only because it ignores the critical fact that not everyone would cooperate with it: Some persons would continue to hunt despite the fact that they were not selected. Because the combined killings by those who were and those who were not selected would deplete herd size below acceptable levels, it would be irrational to retain the random arrangement without alteration.

To adopt a random selection process that would not adversely affect herd size, it would be necessary to make allowance for the number of unselected persons who could be expected to hunt. Such a procedure would entail the selection of *fewer* persons than would have been selected if everyone could be expected to abide by the arrangement. Notice, however, that now the law permitting only those selected to hunt would just be another variation of a law that is made to be broken—a law that is adjusted for noncompliance. If everyone complied with this law, then too few animals would be killed and herd size would exceed desirable levels.

This same form of argument applies generally to all lottery and rationing schemes that are possible alternatives to the hypothetical poaching law.[39] Thus, it is no objection to the poaching law that it is less fair than alternatives that would work well if everyone cooperated with them, because, in fact, it cannot be expected that everyone would cooperate with such alternatives. Given the empirical conditions of noncompliance that led to the adoption of the poaching law in the first place, any alternative purportedly fairer than this law would also be a law that is made to be broken.

The question of the fairness of the speeding law presents different issues. First, if everyone exceeded the fifty miles-per-hour limit, then no unfairness would arise between those who did and those who did not comply with the law. Moreover, no driver could complain that the speed limit was set at only fifty miles per hour, for all drivers would share the blame for having led the legislature to set the speed limit below the optimal speed.

If, however, some conscientious persons did abide by the fifty-miles-per-hour speed limit, then an unfair disparity of position would

39. *See* note 24 *supra.*

arise between them and persons who violated the law. No lottery system would be appropriate here, and the only possibly fairer alternative to the hypothetical speeding law would be a speed limit of fifty-five miles per hour. In that case, conscientious persons would drive at no more than fifty-five miles per hour. But since noncompliance is expectable, others would still exceed the speed limit, and unfairness between these classes of persons would not be eliminated.

Thus, the unfairness that exists under the hypothetical speeding law would persist even if an alternative were chosen that is not made to be broken. The unfairness results not from the operation of the law but from the behavior of those who fail to comply with speeding laws.[40] Moreover, setting the speed limit at fifty-five miles per hour would not only fail to eliminate unfairness to conscientious persons, it could conceivably pose greater risks of harm to conscientious and nonconscientious persons alike. There might, after all, be greater dangers to all drivers if conscientious motorists drove at fifty-five miles per hour and the average flow of traffic were about sixty miles per hour, than if conscientious motorists drove at fifty miles per hour and the traffic flow were thereby reduced to fifty-five miles per hour. It would thus be irrational to replace the hypothetical speeding law with a fifty-five-miles-per-hour speed limit. Finally, it should also be clear that nothing would be gained by setting the speed limit lower than fifty miles per hour. Some drivers would still exceed that limit, and everyone would lose the benefits of a faster but equally safe traffic flow.

It may be concluded, then, that the problems of unfairness raised against the hypothetical laws are not attributable to the fact that the laws are made to be broken, but infect any law that enjoys only partial compliance. Thus, these problems of unfairness do not provide a sound basis for rejecting laws that are made to be broken.

C. *The Problem of the Disparity Between What the Legislature Wants and What the Law Directs*

A third set of objections to the speeding law and the poaching law focuses on the disparity between the behavior these laws expressly prohibit and that which the legislature actually desires. The speeding law prohibits driving in excess of fifty miles per hour, but the legislature wants drivers to exceed that limit; the poaching law prohibits hunting, but the legislature wants some hunting to occur. It might be argued that if the legislative plan is not disclosed, this disparity amounts to deception of the citizenry, and that deception in the legal

40. In general it is a mistake, however, to suppose that those who comply with a law get a poorer bargain than they would have gotten by joining the violators. *See* Schelling, *On the Ecology of Micromotives*, 25 THE PUB. INTEREST 59-98 (1971).

system is objectionable. Further, it might be argued that if citizens are indeed made aware of the disparity, thus avoiding deception, they will become more inclined toward noncompliance, and the predictions of noncompliance on which these laws are based will thus turn out to be inaccurate. To sum up this argument, if the legislative plan is not disclosed these laws are morally unacceptable, and if the plan is disclosed these laws are practically unworkable. Both strands of the argument are unsound.

Assume, to begin with, that the legislative strategy of adjusting the poaching law for noncompliance is fully known. Persons aware of the disparity between the conduct the legislature has proscribed and the conduct that it desires would not, if they were rational, alter their behavior in such a way as adversely to affect this law. It may be supposed, for simplicity, that the population falls into two categories:[41] Holmesian badmen[42] whose behavior is influenced entirely by the perceived costs and benefits to them of engaging in poaching, and conscientious persons whose behavior is motivated by a desire to comply with the law.[43]

It is clear that the conduct of Holmesian badmen would not be altered by knowledge of the legislative scheme. They decide whether to poach by balancing the personal benefits to be gained from poaching against the probability that they will be apprehended and punished and the severity of the sanctions to which they may be exposed. Holmesian badmen are entirely uninterested in the actual desires of the legislature, and, hence, information about these desires will not influence their behavior.

Conscientious persons, on the other hand, take themselves to be under an obligation to obey the law. Since the conduct the poaching law prohibits would be clearly known, conscientious persons would attempt to refrain from that conduct. Recognition of the disparity between what the law directs and what the legislature desires would not alter their perceived obligation to obey the law. Conscientious citizens recognize that their role is to follow legal rules, and not to substitute their personal assessment of the best means of satisfying the objectives of the legislature for the rule that they know the legislature has deemed the best means for satisfying its objectives.[44]

41. In reality, most persons are neither thoroughly selfish nor wholly conscientious. Thus, persons act sometimes from selfishness and sometimes from fidelity to law.

42. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

43. For purposes of this Note, conscientious persons are those who attempt to comply with the law, but who do not necessarily always succeed.

44. There is, arguably, a danger that use of laws that are made to be broken will engender cynicism, even among persons generally inclined to be law-abiding, about the duty to obey such laws. Citizens could, after all, feel that the legislature is exploiting the conscientiousness of some and rewarding the disobedience of others. If such cynicism arose it might well spill over and affect the public's response to many

In the case of the poaching law, the legislature has determined that its objectives will best be achieved not by having a law that allows some persons to poach but by having persons attempt to comply with the law that completely proscribes hunting. This position is reinforced by the fact that a claim that one's violation of the law is motivated by a desire to further the legislative intent will not be accepted as a defense for failing to comply with the law. The claim of a poacher that by violating the law he was contributing to the optimal herd size or the claim of a speeder that he was traveling at the optimal speed would clearly be rejected.[45] Thus, conscientious persons would attempt to do that which the legislature has expressly identified as the legitimate course of conduct. It follows, therefore, that neither the behavior of Holmesian badmen nor the behavior of conscientious persons would be altered in such a way as adversely to affect the poaching law if they were fully aware that the law was adjusted for noncompliance.

It can further be demonstrated that, even if deception were generated by laws that are made to be broken, rational persons would agree in advance to live under a legal system containing such laws. One means of accomplishing this is by determining whether persons

other laws, for people might reason that if one law is made to be broken, any law might be so designed. Thus, a general lack of respect for the legitimacy of laws might be engendered. Whether such cynicism will arise is an empirical question, but certain steps should be taken to mitigate the danger. It is crucial that the legislature be absolutely open about the strategy it is employing, since people are apt to be resentful if they believe they are being duped. It should be made clear that the legislature is doing the best it can, given limited enforcement resources, to minimize the ill effects of noncompliance. Efforts should be made to explain why alternative regulations would be less beneficial to society as a whole, and, perhaps most important, the legislature should appeal to conscientious citizens with the argument that their obedience is needed to compensate for the disobedience of incorrigible badmen and the accidental oversight of otherwise conscientious people. The danger of cynicism rests on possible *misunderstanding* of the legislature's aims: A conscientious person who understood what the legislature was doing would not be more inclined to disobey a law that is made to be broken.

It must be remembered that the limitation on the decision-making role of the citizen is an important feature of a system of legal rules. One of the chief advantages of a rule-oriented system is that, except in very extraordinary circumstances, it bars direct appeal to the utility of individual actions for determining the best course of conduct for a citizen to undertake. *See* Sartorius, *Individual Conduct and Social Norms*, 82 ETHICS 202 (1972). A justification for a system of legal rules is that, on the whole, better consequences will result if citizens attempt to follow the rules rather than to make independent computations about the best means for satisfying legislative objectives. Dangers of misconjecture about the ultimate objectives of the legislature and miscalculations about the best means for satisfying those objectives are apt to lead citizens to frustrate rather than further legislative objectives. This argument is but a special case of one traditional rule-utilitarian argument against act-utilitarianism: that in practice act-utilitarians are apt to make many mistakes, and better results, on the whole, will result from attempts to follow a general rule. *Compare* Rawls, *supra* note 31, at 24, *with* R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 131-32 (1961).

45. The propriety of rejecting a violator's claim that his noncompliance is justi-

in what John Rawls denominates the "original position"[46] would adopt general principles allowing incorporation of such laws into their legal system. Under this method of analysis, any principles that would have been chosen by persons in the original position are automatically deemed just.[47]

Persons in the original position are ignorant of their individual characteristics and the particular position each will occupy in society.[48] They are, however, rational,[49] and are aware of the general principles of the empirical sciences—in particular, of the behavioral sciences.[50] Thus, they recognize that, in society, they and their fellows are subject to such common human frailties as lapses of rationality, weakness of the will, ignorance, mistake, and inattentiveness. Rawls argues that, since persons in the original position would want to protect themselves from the consequences of these human shortcomings, they would select principles that permit paternalistic legislation and a penal system of some kind.[51]

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fied because it satisfies legislative intent is already well established. A clear example may be drawn from the field of antitrust law. It is well known that one of the principal aims of the antitrust laws is the preservation of competition. It is also well known that price-fixing is *per se* illegal. United States v. Socony Vacuum Oil Co., 310 U.S. 150, 223 (1940); Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951); Virginia Excelsior Mills v. FTC, 256 F.2d 538, 540 (4th Cir. 1958); Plymouth Dealers' Assn. v. United States, 279 F.2d 128, 132 (9th Cir. 1960). While it is theoretically possible for an instance of price-fixing to enhance rather than harm competition, *cf.* P. AREEDA, ANTITRUST ANALYSIS 269-75 (2d ed. 1974); E. GELLHORN, *supra* note 13, at 183 n.4 (1976), such an effect is no defense to a charge of price-fixing in any particular case. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. at 221 ("Congress has not left us with the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive").

46. J. RAWLS, *supra* note 8, at 11-22.

47. As Rawls explains:

> [T]he original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair . . . . [O]ne conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice.

Id. at 17.

48. *Id.* at 136-37.

49. For the sense in which persons in the original position are considered rational, see *id.* at 143 & n.14.

50. Persons in the original position understand the laws of psychology, sociology, political theory, and economic theory. *See id.* at 137-38, 145. These laws are relevant for the parties to consider in making their choices. *See id.*

51. Rawls writes:

> [T]hey will want to insure themselves against the possibility that their powers are undeveloped and they cannot rationally advance their interests . . . . It is also rational for them to protect themselves against their own irrational inclinations by consenting to a scheme of penalties that may give them a sufficient motive to avoid foolish actions and by accepting certain impositions designed to undo the unfortunate consequences of their imprudent behavior . . . .
>
> Thus the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society.

Id. at 248-49.

This argument can be adapted to show that persons in the original position would accept principles permitting selection of laws that are made to be broken. The very psychological factors that Rawls cites as creating the need for paternalistic legislation create the need for laws that are made to be broken, for these are precisely the factors that give rise to the inevitability of noncompliance with law.[52] To minimize the potential harm emanating from such noncompliance, rational persons might well adopt a strategy of adjusting laws for this expectable noncompliance. Any deception associated with such laws would not likely create greater impositions than other schemes for dealing with noncompliance. Thus, persons in the original position might prefer to have benevolent deception perpetrated upon themselves rather than suffer the consequences either of drastic penalties and overzealous law enforcement or of untempered noncompliance.

Furthermore, persons in the original position lack sufficiently detailed information about their individual characteristics to know, for any given law, whether they will fall into the class of compliers or noncompliers. They do not know whether it is the ill-effects of the noncompliance of others or of themselves from which they must be protected. It therefore would be rational for them to choose a system that ensures that whatever noncompliance exists will not seriously diminish general welfare, since their chances of benefiting from such an arrangement would be significant.[53]

52. *See id.* at 143 & n.14.

53. This argument should assuage many concerns about possible deception associated with laws that are made to be broken. It might be objected, however, that the argument seriously distorts the Rawlsian original position. According to Rawls, choices made in the original position must be made on the assumption that everyone will comply with the principles chosen, *see* J. RAWLS, *supra* note 8, at 8, for otherwise, the system that is chosen will not be perfectly just. *Id.* at 8-9. Once a conception of the perfectly just system is identified, existing or proposed systems can be evaluated according to how far they depart from our conception of the perfectly just system. *Id.* at 9, 236. Rawls thus separates ideal theory, or strict compliance theory, from what he calls "partial compliance theory." *Id.* at 8. Partial compliance theory is concerned with constructing the best set of rules for imperfectly just systems—systems in which compliance with laws is not universal. For Rawls, then, laws that are made to be broken might have a place in partial compliance theory but not in ideal theory, for, since they will not be universally complied with, they cannot be perfectly just. If this account is correct, then the argument that persons in the original position would allow for the selection of laws that are made to be broken must be unsound. However, it can be shown that Rawls' assumption of strict compliance in the original position is inconsistent with his own description of the circumstances of persons in the original position.

Rawls assumes that persons in the original position know the laws of psychology and sociology. They thus know about irrational inclinations, weakness of the will, and other factors likely to give rise to undesirable behavior. Rawls uses this point to construct his argument for paternalism and for a penal system. He would have persons in the original position utilize this information in making their selections. Nevertheless, he fails to acknowledge that persons in the original position would pick principles that take account of the fact that whatever rules will be in effect will not command universal compliance. The psychological and sociological data with which Rawls endows persons in the original position, however, clearly indicate that uni-

IV. JURY NULLIFICATION: AN ACTUAL CASE

In previous sections, hypothetical examples of laws that are made to be broken were presented and general objections to this strategy of lawmaking were considered. In this section, it is shown that the rule that criminal juries are legally obligated to refrain from nullifying is an example of an actual law that is made to be broken. This rule is then compared to and contrasted with the speeding and poaching laws, and it is found that the prohibition of nullification, unlike our hypothetical laws, does, in fact, operate *by means of deception.* Finally, it is claimed that the retention and acceptance of the nullification rule within our legal system despite its essential reliance on deception indicate that such laws as the proposed speeding and poaching laws, which are not essentially deceptive, would not be alien to our system of justice.

In the federal courts[54] and nearly all state courts,[55] it is a legal

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versal compliance will not obtain. Persons in the original position either possess this information or lack it. If they possess it, then they will pick principles permitting paternalistic legislation and a penal system and laws that are made to be broken. If they lack this information, then they will not pick principles permitting any such legislation. Thus, if the original position does not lead to the selection of laws that are made to be broken, it is internally inconsistent.

It has thus been shown that there are neither ethical nor practical problems arising from the disparity between law and expected conduct that should preclude the adjustment of some laws to allow for noncompliance. It might be added that intentional use of deception not recommended for this Note's hypothetical laws, *see* note 44 *supra*, can readily be found, for example, in economic regulation by administrative agencies. In fact, one author has argued that as centralized economic controls increase, the need for deception increases. *See* Fuller, *Governmental Secrecy and the Forms of Social Order*, in NOMOS II: COMMUNITY 266 (1959). A legislative or administrative measure designed to produce a certain desired result for the economy might be undermined if the reasoning behind the measure were publicized. Devices designed to stimulate some sharply sagging sector of the economy might be undermined if the observations or urgency that led to the decision were made public, for the very confidence needed to improve the situation might be lost.

54. In Sparf & Hanson v. United States, 156 U.S. 51, 101-02 (1895), Justice Harlan stated: "We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in a criminal trial to take the law from the judge and apply that law to the facts as they find them from the evidence."

The circuit courts of appeal have followed this approach. *See, e.g.*, United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972).

After *Sparf*, only one circuit court has acknowledged a jury right to nullify, and the acknowledgment was reluctant and limited. In Wyley v. Warden, 372 F.2d 742 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967), it was held that a provision of the Maryland Constitution requiring juries to be told that the judges' instructions are merely advisory was not inconsistent with the Federal Constitution. Judge Sobeloff branded the Maryland provision as unwise and cited criticism of the provision as "potent and persuasive." 372 F.2d at 745.

55. The leading state case supporting this doctrine is Commonwealth v. Porter, 51 Mass. (10 Met.) 263, 286 (1846), where the court stated:

> [I]t is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the

obligation of criminal juries to refrain from nullifying the law. Oaths[56] and instructions[57] are directed at ensuring that jurors *believe* that they have a legal obligation not to nullify, which is further evidence that such an obligation does indeed exist.[58]

If jury nullification is a breach of the law, it is a breach that is not, however, entirely unwelcome. There is considerable sentiment among courts[59] and commentators[60] that some instances of nullifica-

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legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in [a] matter of law.

Today it is generally recognized that only Georgia, Maryland and probably Indiana explicitly (through constitutional provisions) allow jury nullification. *See* M. KADISH & S. KADISH, DISCRETION TO DISOBEY 49 (1973). The force of the Indiana provision was blunted in the last century by Bridgewater v. State, 153 Ind. 560, 566, 55 N.E. 737, 739 (1899), which held that a trial court in a criminal case "is not required to neutralize the effect of its instructions by telling the jury that they are at liberty to disregard them, and to decide the law for themselves." Further discussion of jury nullification may be found in Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Scheflin, *Jury Nullification: The Right To Say No*, 45 S. CAL. L. REV. 168 (1972).

56. For example, jurors in Michigan take the following oath:

> You and each of you do solemnly swear (or affirm) that you will well and truly try the issues joined in the cause now here pending, and, unless discharged by the Court, a true verdict render; and that you will do so solely on the evidence introduced and in accordance with the instructions of the Court; so help you God.

MICH. GENERAL CT. R. 511.7.

57. *See, e.g.*, 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10:01, *General Instructions before Criminal Trial*, at 186 (2d ed. 1970):

> [W]ith equal emphasis, I instruct you that the law as given by the court constitutes the only law for your guidance, and it is your duty to accept and follow it. It is your duty to follow the law as I give it to you even though you may disagree with the law.

For examples of state court instructions, see CALJIC 1.00, at 2 (3d ed. 1970) (California) ("It is my duty to instruct you in the law that applies to this case, and you must follow that law as I state it to you"); Kansas Jury Instructions § 51.02 ("It is my duty to instruct you in the law that applies to this case and it is your duty to follow all of those instructions . . . . [Y]ou should decide the case by applying the law to the facts as you find them").

58. *Cf.* Smith, *Concerning Lawful Illegality*, 83 YALE L.J. 1534, 1537-38 (1974) ("Moreover, the jury is sworn to apply the law as it is given them by the judge; and one would think that their oath would have some bearing on what they are obligated to do").

59. *See, e.g.*, United States v. Doughtery, 473 F.2d 1113, 1130 (D.C. Cir. 1972) ("The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel . . . and the 19th century acquittals in prosecutions under the fugitive slave law"); United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972) ("We acknowledge the truth that all such verdicts [where jury nullification occurred], especially when viewed in hindsight, cannot reasonably be said to have been undesirable"); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) ("Concededly, this power of the jury is not always contrary to the interests of justice.").

60. *See, e.g.*, Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) ("Jury lawlessness is the great corrective of law in its actual administration); CENTER MAGAZINE, July, 1970, at 60 (comments by Justice Fortas) ("Jurors are not computers; sometimes they do come in with a verdict of innocence when a computer would say that the facts add up to guilt and that the defendant should be punished. We recognize and tolerate this as a worthwhile anomaly in the rule of

tion have desirable results, and that, on the whole, the present system, within which disincentives to nullification are not so strong as to eliminate the practice, is preferable to a system that contains sanctions sufficiently severe to eliminate nullification, or a system in which juries have a recognized right to nullify.

A brief review of the justifications for retaining the jury nullification rule in its present form will identify the reason why that rule may accurately be described as a law that is made to be broken. A significant function that nullification may serve is that of "tempering rules of law by common sense brought to bear upon the facts of a specific case."[61] Many legal rules are rough instruments, constructed with general purposes in mind.[62] While a particular legal rule might produce consequences that are beneficial on the whole, particular applications of the rule might produce injustice. Not every case can be anticipated to which a rule should not be applied, and even those cases that can be anticipated sometimes cannot, for various reasons, be articulated as qualifications to the rule itself.[63] Through nullification, the jury is sometimes able to prevent cases of injustice or hardship that particular applications of an otherwise useful rule might create.

Additionally, the jury has been portrayed as the "cutting edge" of legal progress. When juries regularly refuse to convict under a particular law, prosecutors are apt to lose incentive to prosecute under that law, and the law becomes ripe for repeal[64] or may, under some circumstances, become void.[65] The jury has also been said to provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[66] Still another purported benefit of the jury's nullification power is that, through its exercise, juries are able to relieve the judge of the necessity of making

law"); Comment, *Jury Nullification and the Pro Se Defense: The Impact of* Dougherty v. United States, 21 KAN. L. REV. 47 (1972).

61. United States v. Ogull, 149 F. Supp. 272, 276 (S.D.N.Y. 1957), *affd. sub nom.* United States v. Gernie, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958). *See* United States *ex rel.* McCann v. Adams, 126 F.2d 772, 776 (2d Cir.), *revd. on other grounds*, 317 U.S. 269 (1942) (jury nullification "introduces a slack into the enforcement of the law, tempering its rigor by the mollifying influence of current ethical conventions.").

62. *Cf.* Wigmore, *A Program for the Trial of a Jury*, 12 AM. JUR. SOCY. 170 (1929) ("[A]s a rule of law only takes account of broadly typical conditions, and is aimed on average results, law and justice every so often do not coincide.").

63. *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (Bazelon, J., dissenting) ("The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence"); M. KADISH & S. KADISH, *supra* note 55 at 630.

64. *See* P. DEVLIN, TRIAL BY JURY 160 (1956).

65. *See* M. KADISH & S. KADISH, *supra* note 55, at 128-40.

66. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

morally compelling exceptions that particular facts might indicate, but that the judge, in his special position as guardian of the law, ought not to be forced to make.[67]

The benefits of the jury's ability to nullify enumerated above might appear compatible with either granting juries an explicit right to nullify or instructing juries about their power to nullify.[68] However, it is generally thought that such alterations of the present system would be imprudent. The jury best serves its functions if nullification occurs on a very limited scale, and it is feared that juries might nullify all too readily if they were granted a right to nullify, or were instructed of their power to nullify.[69] One way of indirectly ensuring this restraint is to erect barriers that will be overcome only in those instances in which jurors feel strongly "compelled" by conscience to nullify.[70] The more direct method of telling the jury that it may nullify so long as it feels compelled by conscience to do so might make the jury more inclined to nullify than is optimal.[71]

Under the present system, the jury is impressed with the fact that it has a solemn obligation to apply the law as it is given by the judge to the facts of the case.[72] Thus, when a jury contemplates nullifying it is likely to regard failure to discharge this obligation as a cost, and will be more reluctant to nullify. As a leading commentary stated: "The very technique of explicitly instructing the jury, without qualification, that they are obliged to apply the law as given by the judge helps ensure that they will impose the required extra surcharge on any

67. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 157 (1952).

68. *See* Scheflin, *supra* note 55; Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INTL. L. 71 (1969); Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105 (1971).

69. The court in United States v. Dougherty, 473 F.2d 1113, 1135 (D.C. Cir. 1972), explicitly made use of these prudential considerations in reaching its decision: "The practicalities of men, machinery and rules point up the danger of articulating discretion to depart from a rule, that the breach will be more often and casually invoked." The court continued: "There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charger to carve out its own rules of law." 473 F.2d at 1134.

A commentator succinctly summed up the *Dougherty* position:

> While the power of the jury to nullify clearly exists, and while the exercise of that power can be beneficial in an appropriate case, the risks flowing from the misuse of the nullification power are too significant to warrant any formal communication by the court to the jury that the jury has this power. In short, the court's refusal to sanction formal instructions to the jury as to its nullification power was intended as a brake on the criminal jury, a governor to avoid excesses.

Comment, *supra* note 60, at 59.

70. The court in *Dougherty* stated:

> [I]t is pragmatically useful to structure instructions in such wise that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate an act in contravention of the established instructions.

473 F.2d at 1136-37.

71. *See* M. KADISH & S. KADISH, *supra* note 55, at 65.

72. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 498 (1966).

decision to depart from the rule."[73] Thus, it is thought that imposing on jurors an obligation to refrain from nullifying is preferable to making nullification legally permissible even in limited circumstances. And while the rule against nullification is valued for its tendency to limit the amount of nullification that takes place, it is also valued because the disincentives that it produces are not powerful enough to eliminate nullification altogether.

It may now be shown that the rule against nullification is best viewed as a law that is made to be broken. If criminal juries have a legal obligation to refrain from nullifying, and if it is deemed desirable that criminal juries sometimes do nullify, it follows that it is deemed desirable that juries sometimes fail to discharge their legal obligation—that they sometimes fail to comply with the rule. If the prevailing view is correct, then this rule (prohibition of nullification) has greater utility if it is sometimes broken than if it is universally complied with, for if the rule enjoyed universal compliance, the benefits derived from instances of nullification would be lost. In this respect, the rule against nullification is analogous to the hypothetical laws presented earlier. In each case, a desired amount or mix of behavior is obtained through the operation of a legal rule, and in each case the legal rule operates optimally when some level of noncompliance is manifested. Each takes expected noncompliance into account because the law selected or retained is different from that which would have been selected or retained if noncompliance were not anticipated. If drivers could be expected to observe posted speed limits, then the speed limit would have been set at fifty-five miles per hour rather than fifty miles per hour as specified by the hypothetical speeding law. Similarly, if juries could be expected to discharge their legal obligations uniformly, jurors would be told to apply the law to the facts of the case *except in those instances where doing so would create unnecessary injustice*, rather than to abide by a rule that lacks such an exception clause.[74]

There are, however, important differences between the nullification rule and the hypothetical laws. One difference between them is the measure of noncompliance employed. The speeding law is most

73. M. KADISH & S. KADISH, *supra* note 55, at 64-65.

74. Curiously enough, in arguing against the claim that juries would not abuse their nullification power if instructed of their power to nullify, the court in *Dougherty* drew an analogy that further highlights the similarity of the poaching and speeding laws:

> [A]dvocates of jury "nullification" apparently assume that the articulation of the jury's power will not extend its use or extent, or will not do so significantly or obnoxiously. Can this assumption fairly be made? We know that a posted speed limit of 60 m.p.h. produces factual speeds 10 or even 15 miles greater, with an understanding all around that some "tolerance" is acceptable to the authorities, assuming conditions warrant. But can it be supposed that the speeds would stay substantially the same if the speed limit were put: Drive as fast as you think appropriate, without the posted limits as an anchor, a point of departure?

473 F.2d at 1134.

effective when many drivers depart from it to a certain degree, and the poaching law is most effective when a certain number of acts of noncompliance obtain. In contrast, the desired quantum of noncompliance with the nullification rule cannot be measured statistically. Theoretically, this rule is most effective when noncompliance occurs under limited circumstances—that is, when noncompliance would prevent injustice. However, these circumstances cannot be openly articulated to the jury,[75] and the desired number of instances of nullification, though likely rather small, cannot be specified in advance. Instead, indirect disincentives to nullification are employed to increase the likelihood that juries will nullify in just those instances where they feel "compelled by conscience" to do so. Thus, the desired degree of noncompliance is sought by means of a kind of "stress test," and predictions are made on the basis of rough generalizations about juror psychology.[76]

The most significant difference between the nullification rule and our hypothetical laws is that the nullification rule relies essentially on deception—that is it operates *by means* of deception.[77] The nullification rule leads at least some jurors to believe that they do not have the ability to nullify[78] and arguably deceives at least some jurors into believing that the legal system regards all instances of nullification as undesirable. Moreover, this deception is not innocuous: it has an adverse impact on jurors. Although jurors are not formally penalized for violating the nullification rule, they are subjected to the informal, but no less real, penalty of guilt.[79] Thus, the same "problems" about punishing beneficial actions that arise in connection with our hypo-

75. *See* notes 69-73 *supra* and accompanying text.

76. The *Dougherty* court went so far as to suggest an analogy between the impact on an experimental subject if he were told that he was being studied and the possible impact on the jury's behavior "if they are told of the consequences of their conduct." 473 F.2d at 1136.

Judge Bazelon criticized the majority in *Dougherty* for relying on unsupported predictions about how jurors would react to the instructions of the judge and arguments of counsel: "[S]ince we have no empirical data to measure the validity of the prediction, we must rely on our own rough judgments of its plausibility." 473 F.2d at 1141 (Bazelon, C.J., dissenting).

77. Judge Bazelon recognized this deception in his dissent in *Dougherty*. *See* 473 F.2d at 1139. The majority, however, did not feel that withholding information from the jury about its power to nullify was deceptive. *See* 473 F.2d at 1135.

78. *See* Kunstler, *supra* note 68, at 71. ("[J]urors, almost without exception, have no idea of the extent of their power in this respect, and, under recent case law, they cannot be enlightened as to this power").

79. *Cf.* Huffman v. United States, 297 F.2d 754, 758 (5th Cir. 1962):

> A conscientious citizen serving as a juror wants earnestly to do his duty. He is impressed, as he should be, by the awesome power and prestige of a United States Judge. In performing his role in the pursuit of justice, the juror wants to feel that he is as loyal, as conscientious, as fearless, as courageous and as objective as the Judge. He wants to be a good citizen. He desires, for at least this one time in his life, to measure up to what he senses and feels in the atmosphere of the courtroom.

thetical laws also arise in connection with jury nullification, for nullification is taken to be, in at least some instances, a beneficial action.

However, it is critical to note that it is the deception of jurors about the desirability of some nullification that contributes to the guilt jurors are likely to suffer upon nullification. That the nullification rule is accepted and retained in our legal system would seem to strengthen the case for the acceptability of laws like the speeding and poaching laws which, if they engender any deception at all, do so accidentally.

V. Scope of Application

The remainder of this Note explores the practical impact of the theoretical strategy previously described and defended. It is argued that many varieties of activity are appropriate candidates for regulation by means of laws that make allowance for expectable noncompliance.

Opportunities for applying the strategy are presented, first, with respect to kinds of activities such that the consequences of each performance depend on the number of other performances of that same type of activity. Some acts are not harmful unless a significant number of similar acts occur within a limited period of time. Our hypothetical poaching law was a paradigm of this sort, but many other regulations could be designed similarly. For example, walking on the grass in a public square is a classical example[80] of an activity that might not generate harm unless a significant number of instances occur. An isolated stroll, or infrequent strolls, across the grass may do no harm and may be beneficial to those who cross, but when a great number of crossings occur within a limited period, then each instance contributes to a collectively harmful result: The grass is destroyed. It should be noted that in the present case, noncompliance increases social utility solely through the utility given to those who violate the law. In contrast, noncompliance increases utility in our speeding and poaching examples through the benefits of optimal traffic flow and herd size that are spread generally among all concerned, including persons who comply with the law. Nevertheless, in both cases, it is possible to maximize general utility through a regulation that does not eliminate all instances of a particular activity, so long as the number of performances of the activity remain slightly below the threshold of societal harm. In both cases, a total prohibition might result in maximum utility if the expected noncompliance

80. *See.* D. Hodgson, *supra* note 31, at 167-75; Silverstein, *Simple and General Utilitarianism*, 83 The Philosophical Rev. 339, 344 (1974).

were within certain limits.[81] This rationale may be fruitfully applied to many other cases where there is a threshold number of performances below which no societal harm results.[82]

A second major application of the strategy is to cases in which the population, as a group, can be expected to depart from legal rules to a limited degree. Our hypothetical speeding law illustrated this, but many other cases exist. Just as people can be expected to drive somewhat faster than the posted speed limit, so people can be expected to stay out a bit past an announced curfew, to park a short distance beyond "No Parking Here to Corner" signs, or stop slightly beyond "Stop" signs. In cases of this kind, the degree of deviation from a chosen standard can be anticipated, and the standard can be adjusted in such a way as to ensure that actual deviations do not generate societal harm.

A third area for applying the strategy includes cases in which both the number of acts of noncompliance and the degree of deviation from the rule are relevant. Pollution control and resource allocation are fertile fields for application of the strategy. The harms or benefits of pollution or resource consumption are partially dependent on the total quantity of pollutant discharged and the total quantity of resources consumed, and these total amounts will depend on the number of parties polluting or consuming as well as on the quantities discharged or consumed by each party.

Suppose, for example, n is the optimal quantity of pollution from a certain substance for a particular environment. Assuming that enforcement and inspection resources are limited and that m units can be predicted to be discharged undetected, it would be rational in framing a regulation to set a legal limit of n minus m units. In this way, the combination of detected and undetected units will

81. If n is the number of crossings below which no harm to the grass is produced, then, assuming that persons derive some pleasure or convenience from walking across the grass, utility would be maximized by a regulation that generates exactly n minus one crossings. Of course, n minus one permits to cross could be distributed if only those with permits actually crossed. However, in reality, it would still be necessary to employ a total prohibition since at least n crossings might occur anyway, due to noncompliance with the prohibition. Of course, whether a lawmaker would seek to obtain n minus one crossings rather than zero crossings will depend on whether the utility derived from crossing outweighs the general disruptive effects of having a limited number of illegal crossings and the unfairness created between crossers and noncrossers.

82. Similarly, the establishment of a total ban on parking in front of some public building might be necessary even if a few vehicles could be parked in the area without creating a significant obstruction because, despite the total prohibition, some drivers would park for a period of time in the forbidden area. *See generally* Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943). Another case of this kind might be the setting of a limit on the number of persons who may lawfully occupy an elevator lower than the number of persons who could safely occupy the elevator. Thus, if an elevator could safely hold ten persons, it might be prudent to set the limit at eight, in order to make allowance for those who would take and expose others to the risks of overloading.

equal *n*. Failure to discount *n* by *m* might result in too many units of pollution. Similarly, this approach may be used for resource allocation. For example, energy shortages have forced a reduction in the use of fuel for heating buildings.[83] Regulations should be designed to take into account the number of households that will exceed prescribed limits and the amount by which each is expected to exceed them. Thus, if the optimal thermostatic setting is sixty-eight degrees, but most people are expected to exceed the legal limit by about two degrees, then it would be sensible to set the legal limit at sixty-six degrees.

While there are many activities to which the proposed strategy is applicable, there may be theoretical or practical limits to its application. It would appear that a necessary condition for using the strategy is that the activity regulated be not wholly devoid of social utility[84]—that it not be the case that no instance or that kind of activity could be beneficial. Otherwise, it would be irrational to prefer any noncompliance.

It is not at all obvious, though, that there are any kinds of activity every instance of which is devoid of utility.[85] Thus, it is not clear that the strategy may be theoretically confined to any class of activities. In practice, however, it may sometimes be unprofitable to pursue the strategy. Such would be the case where it is highly unlikely that an appreciable number of beneficial instances would occur, or where the potential benefits from the activity are de minimus.

This Note has identified and defended a previously little-noticed legislative strategy and has suggested that this strategy is applicable to a wide variety of activities. It is obviously not proffered as a panacea for all problems caused by noncompliance, but merely as another of the many techniques legislatures may employ to maximize the societal benefits achieved by legislation.

This Note has not addressed the question whether science can now provide the predictions necessary to carry out the strategy here described. The over-all effectiveness of any scientific approach to lawmaking is necessarily limited by the predictive precision and reliability that current science is able to provide. Exploration of approaches that cannot be immediately implemented may nevertheless be worthwhile, for (a) it is advantageous to have available a framework that can be utilized as soon as adequate predictive tools are developed, and (b) the existence of an apparently promising frame-

83. *See, e.g.*, N.Y. Times, Jan. 31, 1977, at 1, col. 2.

84. *See* Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500, at 504 n.10.

85. *See* Griffiths, *The Limits of Criminal Law Scholarship*, 79 YALE L.J. 1388, 1397 n.38 (1970).

work may influence the direction and speed of empirical research. Moreover, any delay between the articulation and application of a prospective strategy presents an excellent opportunity for refinement of the strategy. Thus, whether or not current methodology is sufficiently sophisticated to provide a firm basis for implementing the strategy of making allowance for expectable noncompliance, something at least has been gained by developing that strategy.